

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL GREGORY LEE,

Defendant-Appellant.

UNPUBLISHED

April 20, 2004

No. 243964

Oakland Circuit Court

LC No. 02-182257-FH

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Daniel Gregory Lee appeals as of right from his jury convictions for possession with intent to deliver between 50 and 225 grams of cocaine¹ and conspiracy to deliver less than fifty grams of cocaine.² Defendant was tried jointly with his alleged coconspirators, Antonio Dean, Darryl Ervin and Thomas Brooks.³ Defendant was sentenced to consecutive terms of five to twenty years' imprisonment for the possession conviction and one to twenty years' imprisonment for the conspiracy conviction. We affirm.

I. Background Facts

On November 13, 2001, Royal Oak police officer Martin Lavin arranged to meet Mr. Dean at an Oakland County Kentucky Fried Chicken to purchase two ounces of cocaine. Mr. Dean arrived at the meeting with his codefendants in a black Lincoln. With several surveillance officers listening over a radio transmission, defendant, along with his codefendants, encouraged Officer Lavin to meet them at a Wendy's within the city of Detroit to complete the transaction. At the subsequent meeting, Mr. Dean attempted to sell Officer Lavin approximately fifty-five grams of cocaine contained in two clear plastic bags. The officers immediately arrested all four codefendants.

¹ MCL 333.7401(2)(a)(iii).

² MCL 333.7401(2)(a)(iv).

³ All four codefendants were convicted of delivery and conspiracy. Mr. Dean has not appealed his convictions or sentences. Our opinions in *People v Ervin* (Docket No. 243965) and *People v Brooks* (Docket No. 245252) are being released with this opinion.

II. Coconspirator Statements

Defendant first claims that the trial court erred in permitting the prosecution to present hearsay statements of codefendants. Specifically, defendant complains that statements made by codefendants to Officer Lavin were hearsay and their admission violated his constitutional right to confront the witnesses against him. We disagree. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.⁴ However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this court reviews the issue de novo.⁵

On direct examination, Officer Lavin testified regarding his prior arrangement to purchase cocaine from Mr. Dean. Officer Lavin further testified to various statements made by defendant and his codefendants during the initial meeting at Kentucky Fried Chicken. Mr. Dean indicated that the cocaine belonged to the other men and that they were not comfortable with the location of the transaction. Mr. Dean encouraged Officer Lavin to follow them to another location in the city of Detroit. Mr. Ervin also approached Officer Lavin's vehicle to encourage him to follow the men down the street to purchase the cocaine. Mr. Ervin later returned to Officer Lavin's vehicle, offering to allow him to hold onto \$2000 as security for his safety. Mr. Brooks also encouraged Officer Lavin to follow the men to another location to conduct the transaction. The codefendants reentered the Lincoln. Defendant drove up next to Officer Lavin's vehicle. First, defendant encouraged Officer Lavin to follow the men stating, "Man, let's do this just follow us."⁶ Defendant negotiated an alternate location for the transaction with Officer Lavin. Defendant first requested that the meeting be moved to any other location on 8 Mile Road, but subsequently requested that the meeting be changed to a location in the city of Detroit. Defendant then arranged to meet Officer Lavin at the Wendy's location later that evening.⁷ Defendant's parting words were, "[D]on't make us go get this shit and then you don't show up."⁸

A statement is not hearsay under MRE 801 if made by a coconspirator of the party against whom the statement was offered and if made during the course of and in furtherance of a conspiracy.⁹ The independent proof must establish a conspiracy's existence by a preponderance of the evidence.¹⁰ Neither direct proof of the agreement, nor a formal agreement, need be shown to prove the conspiracy.¹¹ Circumstances, acts, and conduct of the parties can sufficiently

⁴ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

⁵ *Id.*

⁶ [Trial Transcript July 2, 2002, p 72.]

⁷ [Trial Transcript July 2, 2002, pp 72-73.]

⁸ [Trial Transcript July 2, 2002, p 73.] Officer Lavin's testimony regarding the substance of these conversations was corroborated by the testimony of three surveillance officers.

⁹ MRE 801(d)(2)(E).

¹⁰ *People v Vega*, 413 Mich 773, 780-782; 321 NW2d 675 (1982).

¹¹ *People v Gay*, 149 Mich App 468, 471; 386 NW2d 556 (1986).

demonstrate an agreement in fact.¹² Furthermore, circumstantial evidence and inference may be used to establish a conspiracy.¹³

We first note that the coconspirators' statements were made during the course of and in furtherance of the conspiracy. The statements were made in the course of arranging the actual transaction. However, the trial court improperly admitted the statements of defendant's coconspirators without first determining that a conspiracy existed. A trial judge must determine preliminary questions regarding the admissibility of evidence rather than leaving the decision to the jury.¹⁴ The trial court must resolve preliminary questions of fact, including the existence of a conspiracy, before admitting the evidence.¹⁵ The trial court erred as it failed to determine whether the prosecution had proven the existence of a conspiracy by a preponderance of the evidence before admitting the statements of defendant's coconspirators.

However, the prosecution presented sufficient independent evidence to prove the existence of a conspiracy. Evidence of the coconspirators' concerted actions, independent of their statements, demonstrates a common goal. Defendant's own statements requesting Officer Lavin to "follow *us*" in order to complete the transaction, arranging a new location for the transaction, and telling Officer Lavin that the men needed to pick up the cocaine before the Wendy's meeting are evidence of a concerted action. Therefore, a conspiracy can be shown by evidence independent of codefendants' statements. Accordingly, the court's procedural error does not amount to reversible error.

III. Severance

Defendant also alleges that the trial court abused its discretion by denying his motion to sever his trial. We review a trial court's decision to join or sever codefendants' trials for abuse of discretion.¹⁶ Severance is mandatory "only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that . . . demonstrates that his substantial rights will be prejudiced and that severance is the necessary means to rectifying the potential prejudice."¹⁷ As defendant failed to present such proof or affidavit, defendant must show that he suffered actual prejudice at trial to warrant reversal of the trial court's determination regarding joinder.¹⁸

¹² *Id.*

¹³ *Id.*

¹⁴ MRE 104(a); *Vega, supra* at 780.

¹⁵ *Bourjaily v United States*, 483 US 171, 175; 107 S Ct 2775; 97 L Ed 2d 144 (1987) (construing FRE 104(a), which is identical to the Michigan rule); *Vega, supra* at 779-780.

¹⁶ MCL 768.5; *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

¹⁷ MCR 6.121(C); *Hana, supra* at 346-347.

¹⁸ *Hana, supra* at 346-347.

Defendant claims actual prejudice as he was unable to inculcate Mr. Dean in order to exculpate himself. However, defense counsel presented the theory that defendant was innocent and that Mr. Dean was the only codefendant who played a role in the transaction. Mr. Dean defended on the basis of reasonable doubt, which did not conflict with defendant's defense. Furthermore, as discussed *supra*, the statements made by codefendants were properly admitted into evidence, so their use against defendant was not a result of the joined trial. Defendant suffered no actual prejudice at trial, and reversal of the trial court's joinder decision is unwarranted.

IV. Sufficiency of the Evidence

Defendant next alleges that the evidence was insufficient to support his convictions for delivery and conspiracy. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.¹⁹ "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."²⁰

Possession with intent to deliver cocaine requires proof that the defendant "knowingly possessed a controlled substance, intended to deliver that substance to someone else, and the substance possessed [was] cocaine and defendant [knew] it was cocaine."²¹ Either actual or constructive possession may support a conviction.²² Constructive possession may be found "when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband."²³ In this regard, "[t]he essential question is whether the defendant had dominion or control over the controlled substance."²⁴ Possession of a controlled substance may be joint, with more than one person possessing the substance.²⁵

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction for possession with intent to deliver. Defendant controlled the circumstances surrounding the cocaine transaction as he was the driver of the Lincoln. Defendant encouraged Officer Lavin to conduct the transaction in another location, and actually negotiated the selection of the alternate location. A reasonable trier of fact could have found that defendant had a right to exercise control over the cocaine and intended to deliver the cocaine to Officer Lavin.

¹⁹ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

²⁰ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

²¹ *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002).

²² *Id.* at 500.

²³ *Id.*

²⁴ *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

²⁵ *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748, amended 441 Mich 1201 (1992).

To support a conviction for conspiracy to deliver a controlled substance, the prosecution must prove that:

(1) the defendant possessed the specific intent to deliver the statutory minimum as charged; (2) his coconspirators possessed the specific intent to deliver the statutory minimum as charged; and (3) the defendant and his coconspirators possessed the specific intent to combine to deliver the statutory minimum as charged to a third person.^[26]

The prosecutor need only prove that the defendant cooperated to further the conspiracy's object with the knowledge that a conspiracy existed.²⁷

Defendant was charged with conspiring to deliver less than fifty grams of cocaine, a charge for which there is no statutory minimum amount. Therefore, a rational trier of fact must find beyond a reasonable doubt that defendant possessed the specific intent to deliver and to combine with others to deliver some amount of cocaine.²⁸ Mr. Dean, defendant's coconspirator, actually attempted to deliver approximately fifty-five grams of cocaine to Officer Lavin. Defendant negotiated the alternative location for the transaction and used the same language as his codefendants to refer to the cocaine. The requests of defendant and his codefendants for Officer Lavin to follow the group suggest an intent to combine to deliver the cocaine. It is reasonable to infer from the evidence presented that defendant was cooperating with the others to bring about the delivery of cocaine. Therefore, sufficient evidence was presented to support defendant's conspiracy conviction.

As we have found no error on review, defendant's claim of cumulative error must also fail.

V. Sentencing

Finally, defendant argues that his sentence for possession with intent to deliver was disproportionate as the trial court articulated substantial and compelling reasons for a downward departure yet imposed a sentence above the minimum sentencing guidelines range. If a defendant's sentence falls within the appropriate sentencing guidelines range, we must affirm.²⁹ However, if defendant's sentence is not within the appropriate range, we must determine if the trial court stated substantial and compelling reasons for the departure on the record.³⁰

²⁶ *People v Mass*, 464 Mich 615, 629-630, 633; 628 NW2d 540 (2001), citing *People v Justice (After Remand)*, 454 Mich 334, 349; 562 NW2d 652 (1997).

²⁷ *People v Meredith*, 209 Mich App 403, 411-412; 531 NW2d 749 (1995), remanded on other grounds 459 Mich 62 (1998).

²⁸ See *Mass*, *supra* at 631 (“[I]f one conspires to deliver an unspecified amount of cocaine one would, at a minimum, be guilty of conspiring to deliver less than fifty grams of cocaine.”)

²⁹ MCL 769.34(1); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003).

³⁰ *Babcock*, *supra* at 256.

At the time of defendant's sentencing, the offense of possession with intent to deliver between 50 and 225 grams of cocaine carried a penalty of imprisonment for a minimum of ten and a maximum of twenty years.³¹ Because defendant's offenses were committed after January 1, 1999, the legislative sentencing guidelines apply.³² Under MCL 777.13m,³³ the sentencing guidelines apply to convictions under MCL 333.7401(2)(a)(iii), and make it a Class B offense. Defendant was assigned two points for his PRV score and fifteen points for his OV score. Accordingly, defendant was placed at PR level B and OV level I, which set his minimum sentencing guidelines at fifteen to twenty-five months.

The trial court sentenced defendant to a minimum of five years' imprisonment. Although defendant's minimum sentence is above the guidelines range, defendant's sentence does not represent a departure. If a statute mandates a minimum sentence and authorizes the sentencing court to depart from that term, the sentencing court does not depart by imposing a sentence between the sentencing guidelines range and the minimum statutory sentence.³⁴ MCL 333.7401(2)(a)(iii) mandates a minimum sentence of ten years, and MCL 333.7401(4) authorizes a departure from that sentence. Defendant's five year sentence clearly falls between the minimum statutory sentence and the sentencing guidelines range. Therefore, defendant's sentence does not represent a departure from the sentencing guidelines range and must be affirmed.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

³¹ MCL 333.7401(2)(a)(iii).

³² MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

³³ At the time defendant committed the present offense, the relevant portion of MCL 777.13m was a part of MCL 777.13, but was otherwise identical.

³⁴ MCL 769.34(2)(a).